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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted in accordance with General Assembly resolution 65/208 and Human Rights Council resolution 17/5.

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Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

Summary

In the present report, the international standards relevant to the use of lethal force during arrest are set out. Different models of how countries deal with the issue of lethal force during arrest are identified and discussed. A brief case study deals with the legal framework applicable to targeted killing, where arrest could reasonably have been an option. The point is made that the frameworks established by international law provide sufficient room to deal with serious as well as less serious security threats. Some recommendations are made to ensure greater domestic compliance with the relevant international norms.

Contents

		Page
I.	The protection of life in the context of arrest	3
	A. Introduction	3
	B. International legal framework	6
	C. Domestic standards	11
	D. Targeted killings	15
II.	Conclusions	19
III.	Recommendations	20

I. The protection of life in the context of arrest

A. Introduction

1. The use of force is sometimes described as the core of policing.[1] A more purposive approach, however, is to view police powers, when used lawfully and appropriately, as key tools in the hands of the State to protect the rights of the public, including their right to life. If these powers are not exercised in accordance with human rights norms, they may place the very rights they are meant to protect in jeopardy. Using lethal force could potentially constitute violations of the right to life and other rights such as physical integrity, dignity and fair trial. Only under closely circumscribed conditions may force, and in particular lethal force, be used by the police and, more broadly speaking, law enforcement officers.[2]

2. The authority of the State to employ lethal force, outside of armed conflict, is limited to the use of such force during law enforcement operations and, in some countries, the imposition of the death penalty. Internationally, the use of capital punishment is in decline. The same is not true for the use of lethal force during police action.

3. Lethal force in the course of law enforcement may occur in the context of arrest, demonstrations and private defence (also called self-defence).[3] "Lethal (or deadly) force" entails force that has the potential, and in some cases is certain, to cause death.[4]

4. The subject of the protection of life during demonstrations, especially as seen against the backdrop of the recent events in North Africa and the Middle East, was dealt with in my last report to the Human Rights Council.[5] The present report explores the way in which human rights law deals with the use of lethal force during arrest. There is of course some measure of overlap between the law relating to peaceful assembly and arrest, not least because the police often seek to arrest demonstrators.

5. The international standards that provide for limitations on the use of lethal force during arrest will be set out. For the purposes of the present report a review was done of the relevant legislation of some 101 countries and territories. Five models of how countries deal with this issue, as reflected in their legislation, are identified and discussed. As will be demonstrated, most of these models do not comply with the relevant international standards. A brief case study deals with the legal framework in relation to targeted killing, where arrest could reasonably have been an option. The report concludes with some recommendations to ensure greater

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[1] Following Egon Bittner, *The functions of the police in modern society* (Chevy Chase, Maryland, National Institute of Mental Health, 1970).

[2] The term "law enforcement officers" is broader than "police". The Code of Conduct for Law Enforcement Officials (see note 23 below) includes (in the commentary on art. 1): "all officers of the law, whether appointed, elected, who exercise police powers, especially the powers of arrest or detention" in the concept "law enforcement officials". What is said in the present report in respect of the police also applies to law enforcement officials in general.

[3] Private defence refers to the defence of oneself or others.

[4] Weapons are often, but not always, involved in the application of lethal force. In most instances firing a gun at someone should be regarded as the exercise of lethal force.

[5] A/HRC/17/28. See also A/61/311.

compliance, as a matter of domestic law and practice, with the international standards.

6. Under discussion in the present report is the situation where the police attempt to effect an arrest for a criminal offence, but the suspect resists such arrest by refusing to cooperate, offering resistance or trying to flee. The report does not deal in a direct way with patently illegal and clandestine activities disguised as arrest, as happens, for example, where the police executes a person and then reconstructs the evidence in such a way that it appears as if there was a shootout in the course of an arrest.

7. The question that underlies the report is not whether the police have the power to defend themselves. It is generally accepted that they have at least the same powers as other members of the public to do so in terms of the rules of private defence. The more pertinent question is whether they have additional powers to use lethal force, also in the context of arrest, because of their role as law enforcers.

8. One of the recurring themes of human rights monitoring and enforcement in the field of extrajudicial, summary or arbitrary executions is the excessive use of force, also in the context of arrest. This issue is regularly dealt with by different United Nations human rights bodies, in respect of countries from all parts of the world, and is given high preference by non-governmental organizations in their work.[6]

9. There are several reasons why the use of lethal force by the police, also in the context of arrest, should be viewed as a matter of the utmost gravity, and be based on a solid ethical and legal framework, the application of which should be constantly reviewed. These include the fundamental nature of the right to life; the irreversible nature of death, and in some cases, disability; the potential of errors of fact and judgement; the possibility that innocent bystanders may be killed or wounded; the effect on the legitimacy of the police and the State; and the trauma suffered by everyone involved — which could include the police officers concerned — when a life is ended through violence.

10. Heavy-handed policing can have far-reaching consequences for society as a whole. An escalation in the use of force by the police may raise the general levels of violence in society. Criminal suspects as well as demonstrators often respond to an escalation of force with greater aggression, and as a result police lives may be placed in jeopardy — the classic downwards spiral. The world has recently witnessed in a number of contexts how the use of lethal force during arrest can be the spark that ignites widespread demonstrations and riots. Police brutality in many cases has a disproportionate impact along racial and class lines and as such can exacerbate social division.

11. Various studies have attempted to identify the drivers of the excessive use of force by the police in general, which also finds application in the context of arrest (sometimes said to result in "atrocity environments"). This includes impunity and a culture of lawlessness; the presence of small or elite police units with operational independence; overly hierarchical police structures and autocratic Governments;

[6] See, for example, Amnesty International, *Annual Report 2011: The state of the world's human rights* (London, 2011). Available from www.amnesty.org/en/annual-report/2011; and Human Rights Watch *World Report 2011: events of 2010* (United States of America, 2011). Available from www.hrw.org/world-report-2011.

alternative power structures to the Government; police codes of silence; reluctance by prosecutors to bring charges against the police; pressure or tacit approval from politicians; a lack of oversight; public consent and encouragement; dangerous public rhetoric (e.g., "war on terror/drugs" and "shoot to kill") in a climate of public fear; corruption; a lack of faith in the criminal justice system; perceptions that the poor or other groups are dangerous; exposure of the police to dangerous persons and places; antagonism or abuse from suspects; intoxication; individual psychological reasons; and uncertainty.[7]

12. Accountability in this context could be hard to establish. Most arrests are made by street-level police officers, who often possess a high level of discretion and operate in a low-visibility environment.[8]

13. The rule of law requires that State power will be exercised through the legal system, and that individuals who are suspected of having committed crimes should as far as possible be brought before a court of law, where their guilt has to be proven to determine how they are to be dealt with, in accordance with their right to a fair trial. However, in some cases the urgency of the situation does not allow such a process to take place, and law enforcement officials are given the power by law to use coercive measures and even in exceptional cases to take life-and-death decisions on the spot.

14. Where police officers are granted the right to take instant decisions on whether to use force against those suspected of a crime, the safeguards of legal processes, such as a right to a fair trial, are bypassed. This should be regarded as highly exceptional. Most States today do not allow executions even after an extensive judicial process. There consequently have to be very good reasons and safeguards if the power to use deadly force is placed in the hands of (sometimes young and inexperienced) police officers. One author has said that this entails making "godlike decisions without godlike wisdom".[9] However one wishes to express it, the potential for abuse is clear.

15. Yet it is difficult to conceive of a State whose police do not have the power to use lethal force under any circumstances. A too restrictive approach — where an accused has the proverbial "right to flee" — can entail a dereliction of the State's duty to protect those within its jurisdiction. It should be kept in mind that law enforcement officials have a legal duty to perform their functions. By virtue of their profession, they have a role to play that differs from that of ordinary members of the public. Not giving the police the proper scope to protect the public and themselves could compromise the safety of the public as well as of the police. A system that is seen as too protective of the rights of suspects is unlikely to be effective in practice and could lead to the circumvention of the law by police officers who may tamper with evidence (for example, by planting weapons on those whom they have shot).

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[7] See, for example, Luis Gabaldón, "Uncertainty and the use of force among Venezuelan police officers", *Crime, Law and Social Change*, vol. 52, No. 2 (August 2009), p. 208; and Jyoti Belur, "Why do the police use deadly force?", *British Journal of Criminology*, vol. 50, No. 2 (2010), p. 324

[8] Joseph Goldstein, "Police discretion not to invoke the criminal process: low-visibility decisions in the administration of justice", *Yale Law Journal*, vol. 69, No. 4 (March 1960), p. 543.

[9] Quoted in Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford, Oxford University Press, 2010), p. 130.

16. The challenge clearly is to find the right balance between being overly permissive and overly restrictive. The starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation. The applicable rules should be defined in a way that can readily be used by police officers to take principled decisions under great pressure.

17. In the recent past, questions about whether the international standards in respect of policing can deal with the security challenges posed by threats such as terrorism have been debated with renewed intensity.

18. A major study conducted in 2009 by the International Commission of Jurists investigated the effect of terrorism and counter-terrorism on human rights. According to the study: "Counter-terrorism laws have frequently in the past (and still today as will be seen) reduced legal safeguards relating to arrest, detention, treatment, and trial in order to provide a supposedly more effective framework to combat terrorism."[10] They emphasized the fact that appropriate measures can be taken within the established international frameworks.

B. International legal framework

1. The right to life

19. The right to life is the foundational, or bedrock human right.[11] The right to life is the quintessential inherent right: a right that everyone has simply because they are human beings. Causing the death of someone does not entail placing a temporary limitation on their right to life but its permanent extinction; it also immediately and forever eliminates such a person's ability to exercise any other rights.

20. Article 6 of the International Covenant on Civil and Political Rights is non-derogable in a time of public emergency;[12] and the prohibition on arbitrary deprivation of life is viewed as part of customary norms jus cogens, implying that it cannot be overridden by other legal norms.[13]

21. Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and security of person", while article 6 (1) of the International Covenant on Civil and Political Rights provides that "every human being has the inherent right to life [which] shall be protected by law [and] no one shall be arbitrarily deprived of his life". Everyone is entitled to protection by the

[10] International Commission of Jurists, *Assessing damage, urging action: report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009 (*International Commission of Jurists study*), p. 55; see p. 78, "International law does not preclude powers of arrest, detention and interrogation being assigned to intelligence services, subject to the services complying fully with relevant human rights standards. Unfortunately, the Hearings provided ample evidence that such standards are not being met."; and p. 68, "Post 9/11, this study confirms that intelligence agencies around the world have acquired new resources and new powers allowing for increased surveillance, and law enforcement measures (e.g. powers of arrest, detention and interrogation)."

[11] General Comments Nos. 6 and 14 to the International Covenant on Economic, Social and Cultural Rights, see document HRI/GEN/1/Rev.8, pp. 166 and 178, respectively, para. 1.

[12] Article 4 of the International Covenant on Civil and Political Rights.

[13] See, e.g., General Comment No. 24 (HRI/GEN/1/Rev.8), p. 203, para. 10.

State from infringement by other members of society and to respect for this right by agents of the State.

22. At the regional level, the African,[14] Inter-American[15] and Arab[16] human rights instruments recognize protection against "arbitrary" deprivation of life, while the European Convention on Human Rights uses the term "intentionally".[17] The right to life as formulated in the international instruments is not subject to ordinary limitation clauses. Instead, life may not be "arbitrarily" or "intentionally" taken.

23. This brings the exact scope and reach of the right in the spotlight. Under what circumstances, if any, may the right to life be limited by law enforcement officials? Police action that does not comply with these norms will be regarded as an arbitrary, and therefore illegal, deprivation of life.

24. The foundational nature of the right militates against the right to life being limited in order to protect other values.[18] The sanctity of life requires that lives not be taken to protect other rights, such as freedom of expression. On the same basis, lives may also not be sacrificed in the interest of the common good — for example the shooting of a fleeing suspect in order to promote general respect for the law.

25. However, there are circumstances under which the right to life may be limited that do not necessarily undermine the idea of the sanctity of life in the same way as in the cases described above. This occurs in those rare cases where choices have to be made between two or more lives — tragic choices, in the sense that whatever the decision, life will be lost despite it being done to protect life.

26. As will be demonstrated below, international human rights law proceeds from what will be called in the present report the protection of life principle. This principle entails that while life may as a general rule not be sacrificed to protect other values, under closely defined circumstances one life may be taken as a last resort in order to protect another life or lives.

27. This occurs, for example, where a robber threatens someone's life. In those cases where the police — or for that matter the person threatened — have no choice because of the imminence of the threat but to shoot the robber, such action may be considered justified, because the innocent life is prioritized over that of the aggressor. Provided the requirements of proportionality and necessity are met, such conduct will not be considered "arbitrary" or "unlawful".

28. The right to life may consequently resemble an absolute right (such as the prohibition against torture) in the sense that limitations in order to protect other rights and interests are not permissible. However, the right to life is ultimately not an absolute right in that sense, since under certain exceptional circumstances it may be limited in order to protect life.

[14] Article 4 of the African Charter on Human and Peoples' Rights.

[15] Article 4 of the American Convention on Human Rights.

[16] Article 5 of the Arab Charter on Human Rights.

[17] Article 2.

[18] See, however, Wicks (note 9 above) at pp. 194-197, who explores the question of whether there are not exceptions, for example, in respect of the quality of life.

2. International standards regarding the use of deadly force

29. The main elements of the assessment as to whether the limitation of any human right is justified are the questions of whether the infringement of the right is proportional and necessary. These terms are sometimes used interchangeably, or proportionality is understood as encompassing necessity, but here the approach followed by the mandate holder in earlier reports dealing with the use of lethal force will be used: "While the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate."[19]

30. The concept of proportionality entails some form of balancing. In the context of the right to life, this is problematic, because it requires one life to be prioritized over another while the ideal remains that all lives are regarded as being of infinite value, but it appears to be unavoidable in some cases. Proportionality requires that the rights of the person threatened are measured against those of the suspect in an objective way, in the light of the prevailing circumstances at the time when the final decision on the use of lethal force is made. The potential taking of life (that of the suspect) is placed on one side of the scale, and, since the right to life is at stake, only the protection of life (that of the victim and others threatened) will carry any weight on the other.[20] The question is asked whether the importance of averting the danger to the life of the one party (in the example given above, the person who is being robbed or the police officer, or both) outweighs that of preserving the life of the other (the robber). Considerations such as the level of the threat to the lives of the respective parties and the nature of the crime committed (including the level of violence used) have to be assessed as part of this process.

31. Once it has been established that it would be proportional to use lethal force in order to save lives, it has to be determined whether the use of such force is also necessary, in the sense that a lower level of force will not be sufficient to achieve the same objective. Are there not other, less-than-lethal or non-lethal ways in which the aggressor can be restrained, for example, by using force that incapacitates him or her?[21] A graduated application of force should be followed. If possible, warnings should be given and the suspect should be provided with an opportunity to surrender. It should also be asked whether the person cannot be apprehended afterwards (for example, if the identity or address of the suspect is known to the police) without causing undue harm in the meantime.

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[19] See A/61/311, para. 41. See also *Maria Fanny Suárez de Guerrero v. Colombia*, Merits (CCPR/C/15/D/45/1979); Report of the Human Rights Committee (A/37/40), annex XI, view of the Committee adopted on 31 March 1982, para. 13.2; European Court of Human Rights, *Güleç v. Turkey*, Merits and just satisfaction, Application No. 21593/93; *European Human Rights Reports*, vol. 28, p. 121, Judgment of 27 July 1998, para. 65; *Kelly and others v. The United Kingdom*, Application No. 30054/96, Judgment of 4 May 2001, para. 93; Inter-American Court of Human Rights, *Zambrano Vélez and others v. Ecuador*, Merits, reparations and costs, IACHR Series C, No. 166, Judgment of 4 July 2007, para. 77.

[20] See, however, note 32 below, on rape.

[21] However, it has been argued that care should be exercised in requiring officers to shoot for the legs. Because this is seen as less lethal, the decision to shoot may be taken more easily, while such shots often turn out to be lethal. Instead a high threshold should be met before a firearm is used, but once it is used it should be aimed at the centre of mass. See Wicks (note 9 above) at p. 146.

32. In doing the balancing test required to establish proportionality, the question has to be asked how imminent does the threat to the victim have to be to justify the use of lethal force. How wide, so to speak, are the perimeters placed around the lives that are to be protected which, if crossed, justify preventative action? Does a threat count only when it is imminent and at hand as is the normal requirement with private defence, or can this be broadened under certain circumstances in the context of law enforcement operations, so that a future or more remote threat (e.g., where it appears in the context of an arrest that the suspect may in the future again decide to attack someone) can be regarded as a threat to life that justifies the use of lethal force by the police?

33. The ideal posed by the protection of life principle is that only immediate and clear threats to life will be regarded as a justification for the taking of a life. However, in reality some decisions have to be taken under circumstances of uncertainty, including uncertainty about the likelihood that a particular threat will materialize (e.g., a fleeing suspect who has just attacked someone shouts, "I'll be back!"). Uncertainty opens up the opportunity for overreaction and also for wilful abuse. Those who wish to clothe their actions with the legitimacy of the law often define the protected interest as broadly as possible — that is, they draw the perimeters around the lives they are protecting so widely that it includes distant or even fanciful harm.

34. The overriding logic of the situation remains the fact that the police have the power to use lethal force only as an exception to the rule of law, motivated by a need for urgent action in order to avoid an even greater evil. If that rationale disappears, the foundation for the exceptional powers and consequently the powers as such disappear. Later in the present report, the Special Rapporteur will return to some possible approaches in this regard — the future danger and ongoing danger approaches.

35. Also important is that the decision to use lethal force should be taken as closely as possible to the time when that decision is executed, in order to allow for the suspect's autonomy and free will to change his behaviour.[22] Only in the most exceptional cases will it not be required to allow the suspect the opportunity to surrender.

36. The authoritative statements of international law that set out the principles on the use of force by the police are to be found in the Code of Conduct for Law Enforcement Officials[23] (hereafter the Code) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[24] (hereafter the Basic Principles). The essence of these instruments is reflected in the "protection of life" principle as

[22] See Kremnitzer and others, "The use of lethal force by police", *Criminal Law Quarterly*, vol. 53, No. 1 (2007-2008). In the seminal case of *McCann and others v. United Kingdom*, Judgment, merits and just satisfaction, Series A, No. 324, Application No. 18984/91, and *European Human Rights Reports*, vol. 21, p. 97, Judgment of 27 September 1995, a number of working theses about the conduct of the suspects were conveyed to the soldiers who were supposed to arrest suspected terrorists which made the use of, what turned out to be, unwarranted deadly force almost unavoidable. See also A/65/321.

[23] General Assembly resolution 34/169, annex.

[24] See *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990*: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2, chap. I, sect. B).

described above. These principles may be applied in respect of arrest, detention or private defence by law enforcement officials.

37. Article 3 of the Code is brief, limiting the use of force by law enforcement officials to only that which is "strictly necessary" in order to carry out their duties. The commentary included in the Code, however, expands upon this article, posing the standard that the use of force must be "reasonably necessary" and comply with the requirement of "proportionality", and in paragraph (c) sets out the bounds within which firearms are to be used. It states that the use of firearms is an extreme measure and is to be limited to the exceptional circumstances where "a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender". It can be deduced that it is not the fact that someone suspected of having committed a crime stands to be arrested as such that justifies the use of firearms but rather the danger that this person poses to life.

38. The Basic Principles flesh out the provisions set out in the Code. The Basic Principles contain provisions regarding the steps to be employed prior to the use of firearms, including issuing warnings,[25] the conditions to be observed when firearms are used[26] and, in the event that firearms are utilized, steps to be followed subsequent to the use of such force (providing medical assistance and submitting a report).[27]

39. Principle 5 contains provisions requiring that restraint must be exercised so that force is limited to the minimum. Force is to be used as a last resort and the force used must be within the bounds of necessity and proportionality.

40. Principle 7 provides that: "Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law." According to principle 8: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles."

41. Principle 9 requires Governments to adopt fairly detailed rules and regulations on the use of firearms by law enforcement officials. It, further, states unequivocally that firearms may be used only in "self-defence or in the defence of others against the imminent threat of death or serious injury". It seems that, in the same way that certainty of death of the attacker is not required in defining lethal force, a threat of serious injury is regarded as grave enough to justify a response with lethal force.

42. The second sentence of principle 9 prohibits the intentional lethal use of firearms except when it is "strictly unavoidable in order to protect life". The point of the last sentence of principle 9 seems to be that where death is a certainty, the standards of proportionality are higher than would otherwise be the case.[28]

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[25] Principle 10.

[26] Principle 5.

[27] Principle 6.

[28] In this context, it is instructive to look at the German Model Act, aimed at assisting the *Länder* with drafting their own legislation, which provides as follows: "The firing of a shot which will, with a probability bordering on a certainty, result in death, is only permissible to avert a present danger to life or a serious infringement of a person's physical integrity" (section 41 (2) of the model draft of a uniform police regulation).

43. It can be surmised from the above that protection of property cannot be invoked as a justification for the use of potentially lethal force unless it is somehow linked to the defence of life (e.g., protecting a hospital or acting in other cases where destruction could endanger lives, as is the case with nuclear plants, etc.).

44. The instruments cited above make it clear that violations of the right to life do not only occur where there is a failure to respect or protect life, but also when proper investigations are not undertaken, and proper accountability does not occur.[29] The onus is on the State, where credible accusations are made that illegal killings have taken place, to conduct effective investigations and ensure accountability.[30] Such investigations are important in order to ensure that excessive force is not used during arrest, but also in order to expose those cases where executions are covered up as law enforcement.

45. Potential forms of accountability include criminal charges (e.g., murder and manslaughter or homicide); civil law liability for damages; other forms of compensation; and internal disciplinary processes that may lead to the censure and even dismissal of officers.[31]

C. Domestic standards

46. It was said above that under international law standards the reason why lethal force may be used during arrest relates not so much to the fact that a crime has been committed, but rather to the danger posed by the suspect, which ties in with the weighing process that lies at the heart of the proportionality requirement. It was argued that the exception to the rule of law and fair trial requirements (in terms of which the fate of a suspect has to be determined by a court), which allows the use of lethal force by the police in the case of arrest, is triggered by the suspicion that a crime has been committed, or the threat of serious violence. The accused has, forcibly — that is, through his own use of force — caused a situation where the ordinary rules of the legal process cannot be followed.

47. On the domestic level, the key consideration has traditionally been the seriousness of the crime committed by the suspect and this consideration remains important, but as will be made clear, this serves largely as an indication (and not necessarily a good one at that) of the danger posed by the suspect.[32] Domestic law increasingly also focuses on objective indicators of the danger posed by suspects, which fit in better with the "protection of life" principle.

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[29] *McCann* (note 22 above), para. 161; *Ergi v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, Judgment of 28 July 1998, para. 86; *Case of the Street Children (Villagrán Morales and others) v. Guatemala*, Merits, IACHR Series C, No. 63, Inter-American Court of Human Rights, Judgment of 19 November 1999, para. 139.

[30] The European Court of Human Rights has held that States have to investigate not only excessive use of force but also alleged racist motives of killings. *Nachova and others v. Bulgaria*, Merits and just satisfaction, Application Nos. 43577/98, 43579/98, Judgment of 6 July 2005, para. 77.

[31] See *Baboeram-Adhin and others v. Suriname*, Merits (CCPR/C/24/D/146/1983); Report of the Human Rights Committee (A/40/40), annex X, views of the Committee adopted on 4 April 1985, para. 16.

[32] "Serious violent crime" clearly includes crimes such as murder, but the question could be asked whether rape necessarily threatens life, and consequently whether it could be a basis for the use of deadly force. It has been argued that rape dehumanizes people, which is akin to their losing their lives, and as such, should qualify in some cases. See Wicks (note 9 above), at p. 129.

48. The terms "proportionality" and "necessity" are typically used on the international level, while both these terms as well as the term "reasonable" (in some, but not all, instances to encompass both proportionality and necessity) are often used on the domestic level. One of the challenges is to make sure that the concept of reasonableness is not used in ways that pose lower standards than those posed by proportionality and necessity.

49. Arrest literally means "to stop, come to a stand, halt" and is one tool at the disposal of the police to bring a suspect to trial. It can also serve the purpose of preventing crimes or permitting investigations.[33] Punishment falls outside the remit of the police and cannot be the motivation for arrest or the use of force.

50. Where a suspect tries to avoid arrest, most of the legal systems studied recognize that if the suspect places lives in immediate danger, lethal force may at some point be used by the police. However, the police in most systems also have powers which exceed that which private defence affords ordinary members of the public, based on their duty to protect the public. It has been held in a number of seminal cases that the mere fact that a criminal suspect will otherwise get away is not a sufficient justification to shoot.[34]

51. A review of the legislation of some 101 legal systems was done for the present report. It was found that several alternatives of how legal systems deal with the use of such lethal force during arrest by the police present themselves on a continuum, ranging from the overly permissive to the restrictive.

52. At least five models may be distinguished, in terms of the kind of defence or justification that they offer, in the legislation studied (and in some cases in the case law or common law, although a comprehensive investigation of those sources of law fall outside the scope of the report). The dominant features of each of the five models will now be set out, and the extent to which they comply with the international norms will then be discussed.

53. In some countries (mostly those influenced by the Common Law system), "fleeing felons" may be shot in the context of arrest (model 1). Felonies used to be violent crimes for which the death penalty could be imposed, but over time other less serious crimes were also classified as felonies, resulting in a situation where non-violent crimes could also justify the shooting of a fleeing suspect.[35] A similar approach is followed in countries where a number of crimes, whether they involve violence or not, are listed in a schedule to an act that allows the police to shoot those suspected of having committed these crimes, if they are unable to arrest them by other means. Since the protection of life is not required under this model, such systems are clearly not in conformity with international standards.

54. The legislative provisions of another group of countries provide that lethal force may be used only where the crime concerned has involved serious violence, or

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[33] There is some disagreement on this point. However, prosecution does not always follow from arrest.

[34] The leading case in this regard is United States Supreme Court, *Tennessee v. Garner*, 471 U.S. 1 (1985) No. 83-1035. See also the South African case *Ex Parte Minister of Safety and Security and Others: In Re: S v. Walters and Another, Butterworths Constitutional Law Reports*, vol. 7 (2002), p. 663 (Constitutional Court).

[35] See J. Simon, "*Tennessee v. Garner*: The fleeing felon rule", *Saint Louis University Law Journal*, vol. 30 (1985-1986), p. 1264.

at least the threat of serious violence, which is a sufficient condition for the use of lethal force (model 2). In a bow to the "protection of life" principle, a presumption is in effect created. The fact of the earlier violence serves as a proxy to support the conclusion that the suspect poses a future danger. By committing such a serious crime, so the argument goes, the suspect has crossed a certain threshold and has shown an absence of restraint from engaging in serious violence.

55. This approach, although an improvement on its predecessors, still circumvents the proportionality test in an unsatisfactory way. It may be true that most fleeing suspects who have committed serious crimes in the past constitute a future danger to other people, but this clearly does not apply in respect of everyone in that position. The presumption cannot be irrefutable. There is, for example, little reason to believe that someone who has committed an isolated crime of passion against a particular individual and is on the run necessarily constitutes a danger to society as a whole. A first-time robber who throws his gun away as he is fleeing will probably be in the same position. This model also falls outside the realm of the international standards.

56. Another approach followed by some countries, which is closer to the international norms, is to require the arrestor to have a reasonable belief that the suspect poses harm before lethal force may be used, but not to pose any requirements in respect of the seriousness of the original offence (this will be listed as model 4; model 3 combines models 2 and 4, and will be described immediately hereafter). Such an approach poses a high threshold in the sense that the arrestor, who often has to take a split-second decision, may be required in a subsequent court case to bring evidence that he or she has made a fairly complicated risk assessment, and if the decision is wrong, he or she could face serious consequences. However, this model places a police officer in a position where he or she has to take life-or-death decisions, where the threshold requirement that a crime involving (the threat of) serious violence must have been committed, has not been met. Such an approach runs the danger of undermining the notions of the rule of law and fair trial, discussed earlier.

57. A less demanding category (ranking with, or arguably even below, the "violent crime" approach of model 2) may now be introduced, in terms of which a violent crime or danger is required — either will do (this will be ranked as model 3).

58. The most stringent approach is to require the commission of a crime involving (the threat of) serious violence as well as proof that the suspect constitutes a threat (model 5). Under this model, the commission of a crime involving (the threat of) serious violence is a necessary, but not a sufficient, condition for the use of lethal force. The fact that the person who flees is suspected of having been involved in a crime of serious violence or a threat thereof is only the first hurdle — then the second (and, as we have seen, not insignificant) hurdle, that of posing a threat, also has to be cleared. This model — depending on how the question whether the suspect poses a threat of violence is interpreted, which will be discussed below — comes closest to being in conformity with the requirements of the rule of law and meeting the "protection of life" principle that underlies the international standards.

59. Based on the above exposition, the following models of the kind of justification or defence that may be provided for the use of lethal force may be identified, in order of increasing restriction:

1. Any felony (no other requirement posed)

2. Violent crime (only)

3. Violent crime or danger (meeting either requirement will do)

4. Danger (only)

5. Violent crime and danger (both are required)

60. This necessitates a consideration of the question of how the danger or harm that the fleeing suspect poses in model 5 (or models 3 and 4) has to be assessed. How close or immediate does the threat have to be to fall within the scope of the "protection of life" principle? Different approaches are followed, but a useful distinction can be made between a suspect who poses a "future danger" and one who presents an "ongoing" threat.[36] An ongoing threat is posed by suspects in respect of whom there is a high probability of immediate harm to specified or unspecified individuals. They are obviously highly dangerous and the danger could be realized at any moment. This may be the case with serial killers, someone on an unfocused revenge spree, some members of violent gangs or those who are fleeing from acts of terrorism.[37]

61. A future danger does not have such a continuous character — it may or may not recur in the near future, as is the case with most robberies. Clearly, allowing the use of lethal force only against an ongoing threat in the context of arrest is easier to reconcile with the ideal of a clear and imminent threat as posed by the "protection of life" principle, than would be the case with a future danger, and the former constitutes the preferred option.

62. The discussion so far has largely centred on proportionality, as supplemented by necessity. In the legislation of a number of countries, however, proportionality is not required or plays a minimal role. Instead, the focus is purely on necessity. The only question asked is whether the least harmful means available to stop the suspect are used. For example, did the police try to shoot at the legs, were warnings given and what kinds of weapons were used? These are valid considerations, but incomplete because proportionality is not addressed. The question is not asked whether the level of force used is justified in the first place.

63. There are legal systems where the use of lethal force (or for that matter, force in general) is not formally regulated by law, or very minimally so. In some cases the requirement of "reasonableness" is merely posed, without a clear definition of the term, whether in legislation or in the jurisprudence of the courts. A more widespread and equally worrying situation, alluded to earlier, is where there are formal legal provisions in place, which in some cases purport to be highly protective of the right to life, but, for a variety of reasons, they are not enforced or only partially enforced, or even used as a ruse to hide plainly illegal activity.

64. A question mentioned at the outset is whether citizens should have the same powers as the police to use lethal force. Citizens are entitled to protect their lives through private defence, which can be used if they are attacked while affecting a citizen's arrest. However, they do not have the same law enforcement duties as the police, and they do not have the same training and organizational accountability. In short, they do not play the same role as the police. As a result the same

[36] See Kremnitzer (note 22 above), at p. 92.

[37] See Gabriella Blum and Philip Heyman, "Law and Policy of Targeted Killing", *Harvard National Security Journal*, vol. 1 (June 2010), p. 161.

considerations do not apply that justify granting them the power to use lethal force beyond what is offered by private defence.[38]

D. Targeted killings

65. The issue of the use of lethal force and arrest also comes to the fore in the context of the increased use of targeted killing, as it manifests itself in practices such as drone strikes and raids (including, for example, the killing of Osama Bin Laden in Pakistan by forces of the United States of America).[39] In respect of the latter case, at least some of the information available suggests that the objective was to kill, not to capture, Bin Laden.[40]

66. In the context of the mandate, targeted killing has been defined as the intentional and deliberate use of lethal force, "with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator".[41]

67. Without commenting on the full range of issues surrounding the legality of such operations, including those related to matters such as sovereignty, the present report addresses the question as to what extent a decision that is taken in advance that rules out the possibility of offering or accepting an opportunity to surrender render such operations unlawful.

68. Much will turn on the applicable system of law. If the targeting occurs in the context of law enforcement, international human rights law applies exclusively. If it takes place during armed conflict, international human rights law remains applicable; however, international humanitarian law finds application as lex specialis.[42]

69. While both systems of law allow the use of lethal force by State agents under certain circumstances, the approaches followed are very different. In the case of international human rights law, the use of deadly force is regarded as exceptional, and is legal only in the limited set of circumstances applicable to law enforcement situations described in the rest of the report. International humanitarian law is generally more permissive with regard to the use of lethal force; however, for such force to be used lawfully, various rules have to be complied with, as will be discussed below.

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[38] The legislation of the 13 countries studied allows for civil arrest, although in most cases civilians are only allowed to assist the police with arrest.

[39] See A/65/873-S/2011/381, para. 22; S/2011/120, para. 35; Mary Ellen O'Connell, "Unlawful killing with combat drones: a case study of Pakistan", *Notre Dame Law School Legal Studies Research Paper No. 09-43* (2004-2009), p. 21. See also the comments of the Legal Advisor to the United States Department of State, Harold Koh, "The lawfulness of the U.S. operation against Osama bin Laden", at http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/.

[40] See, for example, the comments by United States Attorney General, Eric Holder: "The reality is, we will be reading *Miranda* rights to a corpse" in *The Washington Post* article "If bin Laden is found, he'll be killed, Holder says", at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031603753.html.

[41] See A/HRC/14/24/Add.6, para. 9.

[42] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 25.

70. The question may be asked whether the traditional law enforcement framework offers realistic solutions to extreme cases, such as those presented by some terrorist activities or hostage situations. Human rights law dictates that every effort must be made to arrest a suspect. In terms of the necessity test discussed earlier, graduated force that is proportional and necessary in the circumstances may be used in order to arrest the suspect. Where there is no other way to counter an immediate threat to life — for example where the proportionality requirement is met and there is reason to believe that a suspect will shoot immediately if confronted — instantaneous, unannounced force, including lethal force, may be used. Such cases can be resolved within the confines of the norms applicable to law enforcement without changing the well-established legal framework, or arguing that international humanitarian law applies in cases where it clearly does not.

71. In the case of international armed conflict, it is often stated that enemy soldiers "may be killed at any time and any place", and as a general rule no attempt to arrest has to be made and no opportunity to surrender need be given. However, as will be argued below, the use of lethal force during armed conflict remains subject to constraints such as military necessity. In non-international armed conflict, members of opposing forces may also be targeted as long as they directly participate in hostilities, but again this is subject to military necessity. When a combatant, or a direct participant in hostilities is placed hors de combat, or surrenders to the enemy, the enemy may not kill or injure such a person.[43]

72. A State may, under no circumstances, follow an approach in terms of which an offer to surrender will not be accepted. Orders that "no quarter be given" constitute war crimes.[44]

73. The underlying philosophies of international human rights law and international humanitarian law are different. Actions taken against a suspect in the law enforcement context are premised on the notion of suspected guilt of criminal conduct. As was alluded to earlier in the report, the final decision to shoot should be taken as near in time as is possible to the actual shot being fired, in order to allow for the suspect concerned to change his or her mind and withdraw from the conduct that poses a threat to the life of another or others.

74. In international armed conflict, the use of lethal force is generally based not on suspected individual guilt, but on the enemy's status or active membership of a larger collective, namely, a dangerous opponent. Individual guilt normally does not enter into the picture. Targeted killing, however, when conducted as part of such armed hostilities, does not conform to this paradigm. The target is identified on an individual basis, which is tied to his or her individual conduct or perceived guilt, which makes some comparison with the law enforcement paradigm difficult to avoid.

75. To determine whether an opportunity to surrender has to be offered to someone in the position of a Bin Laden, or an attempt be made to arrest him, one of the key questions is therefore a factual one, namely, whether there is an armed conflict in

[43] Article 40 of Additional Protocol I to the Geneva Conventions; article 4 (1) of Additional Protocol II to the Geneva Conventions.

[44] Article 8(2)(b)(xii) and article 8(2)(e)(x) of the Rome Statute of the International Criminal Court. Customary International Humanitarian Law rules 46 to 48 provide that it is also a crime under customary law.

the country in question, in this case in Pakistan, or where there is not an armed conflict in the country as a whole, whether there is one in the region involved. It is clear that there are ongoing non-international armed conflicts in Afghanistan and Iraq, as in both instances the United States forces and their allies are engaged in hostilities with the consent of the host Government, the opposing forces constitute organized armed groups who are identifiable as such, and the requisite threshold of violence has been met.

76. There is, however, disagreement on whether the situation in Pakistan amounts to an armed conflict. If the situation in Pakistan falls short of the legal definition of "armed conflict", as some commentators maintain, mostly on the basis that the intensity of violence does not meet the threshold of armed conflict, the law enforcement paradigm applies.

77. Even if it is accepted that there is an armed conflict in the particular country, or parts thereof, it still does not follow that there is an armed conflict in the particular region where the operations take place. As has been emphasized, the existence of armed conflict merely triggers the application of international humanitarian law. The use of lethal force during an armed conflict situation will only be lawful if such force is used in strict conformity with international humanitarian law.

78. What would be the consequences of the view that operations such as those in Abbottabad, Pakistan, took place in the context of a non-international armed conflict? The lawfulness of the action in this paradigm will be dependent on whether the target was a direct participant in hostilities (or fighter), and whether the force used complies with the requirements of international humanitarian law, including military necessity. Whether a person is a direct participant in hostilities is a factual question determined by the function the relevant person performs, "for such time" as the person performs that function.[45]

79. The International Committee of the Red Cross Guidance on direct participation in hostilities identifies what amounts to a new category of participants, those with a so-called continuous combat function.[46] According to the Guidance, a person belonging to this category may be targeted, like a combatant in international armed conflict.[47] However, to accept that such a person is a direct participant in hostilities entails stretching the categories at stake beyond their normal meaning. Whether a person is a combatant in international armed conflict is a question of status, as one becomes a combatant by virtue of membership in the armed forces of a party to a conflict. The continuing combat function category imports a similar determination made on the basis of status into the concept "direct participation in hostilities".[48] However, the relevant treaty language does not provide a clear basis for such a status determination in the context of direct participation in hostilities. Instead, direct participation in hostilities is a question of fact and lasts only as long as the relevant person is engaged in an activity that meets the threshold of direct participation in hostilities.

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[45] Article 51(3) of Additional Protocol I; article 13(3) of Additional Protocol II.

[46] International Committee of the Red Cross, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law (ICRC Guidance)*, 2009, p. 34.

[47] Ibid., p. 66.

[48] See A/HRC/14/24/Add.6, para. 65.

80. The situation in each country has to be assessed on a case-by-case basis, in order to determine whether there is an armed conflict or not. The idea of a global "war on terror", if taken literally, would imply that international humanitarian rules can be used to justify targeted killings in any country in the world, at any time, which would mean the entire globe is a theatre of war; a war without borders. This would undermine the very basis of the restraints on the use of force that international law seeks to maintain. Any claim that a particular targeted killing in Pakistan was lawful cannot be transferred to serve as an argument that similar actions in other countries or regions is lawful.

81. Other differences also need to be kept in mind. In a situation that occurs in the mayhem of the battlefield, providing an opportunity for arrest normally does not enter into the picture. The question can, however, legitimately be asked whether the same applies where a specific opponent is in relative isolation, who has been under surveillance for years, far from the battlefield, and overwhelming force is available. States must not inflict "harm greater than that unavoidable to achieve legitimate military objectives".[49] States may only exercise force that is militarily necessary and consistent with the principle of humanity.[50]

82. The view of the International Committee of the Red Cross, as expressed in its Guidance, is that "it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force".[51] Indeed, the principles of military necessity and humanity dictate that a person may not be killed where less harmful means are available, such as arrest.[52]

83. In situations of uncertainty, the onus of proof becomes important. States are required to provide the legal basis for targeted killings.[53] Those who wish to stretch established categories and rules of international law beyond their established meaning have to justify this.

84. International humanitarian law requires a State to investigate, and if appropriate, prosecute individuals for violations.[54] Similarly, human rights law guarantees the right to a remedy.[55] Transparency is a necessary component of the obligation incumbent upon States to investigate alleged violations of both international humanitarian law and international human rights law. The starting point for States to comply with their obligations to ensure transparency and accountability is to disclose the safeguards in place when conducting such operations which ensure that violations are not committed. These safeguards must include the possibility to abort any targeted mission should the continuation of the

[49] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 78.

[50] Article 1(2) of Additional Protocol I; preamble to the Hague IV Regulations concerning the Laws and Customs of War on Land; article 142 of the Third Geneva Convention; and article 158 of the Fourth Geneva Convention. See also A/HRC/14/24/Add.6, para. 77.

[51] *ICRC Guidance* (note 46 above) at p. 82.

[52] Israel High Court of Justice, *The Public Committee against Torture et al. v. The Government of Israel, et al.*, HCJ 769/02, Judgment of 14 December 2006 (Public Committee against Torture in Israel), para. 40.

[53] See A/HRC/14/24 /Add.6, para. 87.

[54] Customary International Humanitarian Law, rule 158.

[55] Naomi Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law", *California Law Review*, vol. 78 (1990), p. 463.

operation place legal obligations in jeopardy; for example, if the target is hors de combat or surrenders.

85. To a significant extent, the eventual assessment of situations of this kind will have to turn on the scope of the potential violations of the right to life. Even one (especially high profile) case could set a dangerous precedent, also for other States to follow, but the more continuous and systematic a practice of questionable targeted killing becomes, the more questions will be raised.

II. Conclusions

86. **Perceptions about looming dangers often prompt attempts to justify the use of lethal force on the basis of an expanded "protection of life" principle, where the threat is neither present nor ongoing. The scale of the current danger, it is then argued, is such that the perimeters of defence need to be pushed outwards, or forwards, into the future.**

87. **The fact that one is dealing with such situations should not give rise to different standards concerning the use of force. As stated by the International Commission of Jurists:[56] "Human rights and humanitarian law were not drafted with peace and political stability in mind. Rather, the very raison d'être of this legal system is to provide States with the framework that allows them to respond effectively to even the most serious of crises." To follow a different approach will undermine the basic structures of the rules of international law.**

88. **The main principles concerning the use of lethal force in accordance with international law, during arrest, may be summarized as follows:**

(a) **The power of the police to use lethal force during arrest is of the utmost gravity and should be regarded as an exception to the rule that needs to be justified, each case on its own facts;**

(b) **The starting point is the sanctity of life. International norms in this regard are premised on what has been called the "protection of life principle": the right to life may be limited only in order to protect life;**

(c) **Lethal force, in the sense of force that is likely or certain to end life, may therefore be used during arrest only in the interest of protecting life. Such action can be justified only where the suspect has committed or threatened a crime involving serious violence; poses an immediate or ongoing threat; if such action is otherwise proportional; and if it is necessary;**

(d) **Proportionality requires that, all things considered, the harm done to the aggressor does not outweigh the value of protecting the life of the victim. Necessity requires that no less harmful alternative (e.g., the use of less-than-lethal force, or other forms of arrest) is available;**

(e) **Lethal force may not be used purely to protect property;**

(f) **Ordinary members of the public should not be given the same powers of arrest as police officers;**

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[56] *International Commission of Jurists study* (note 10 above), at p. 18.

(g) **All instances where lethal force has been used should be investigated through an effective process, and where appropriate those who have violated the right to life are to be held accountable. The State must provide medical care for those whom its agents have wounded.**

89. **It is up to each society to give concrete legal contents and application to these norms. The question should be asked who or what institutions are in the best position to do this. The candidates include the legislature, the courts and individual police officers.**

90. **One approach is for the legislature to provide detailed standards on the use of lethal force, leaving little discretion to police officers and the courts. For example, the elements to be taken into consideration in making the proportionality test can be spelled out in legislation. Following this route carries the promise of legal certainty. The disadvantage is that no set of rules, however elaborate, can foresee and deal in a satisfactory way with the full complexity of the kinds of situations that arise in this context. Moreover, it could be seen as compromising the sanctity of life to announce in advance that there are formulas that describe in detail when and how lives may be taken. As was stated above, the notion of balancing lives, although unavoidable, remains problematic.**[57]

91. **The second approach entails that the legislature provides basic guidelines only, and leaves it to the police and the courts to give practical application to the international norms. A possible resulting lack of statutory certainty, it can be argued, is compensated for by the fact that such an approach allows for human discretion to be exercised on an ad hoc basis, first by the police and then by the courts and in the standing orders of the police. Over time, a set of practical rules could be developed in an organic way through custom that will be responsive to nuances and further developments in social norms, within the confines of the international norms.**

III. Recommendations

92. **Law reform should be undertaken to bring domestic laws on arrest into conformity with international standards, especially in respect of the core principles outlined above. Use-of-force policies should be developed that provide guidance to the police on the laws and values which should inform their use of force, on the permissible levels of force, and on other issues such as the need to give priority to the safety of civilians. These policies should address deadly, as well as less-than-lethal and non-lethal, force. They may be developed by national or other governments or by police agencies in accordance with international standards, acting in consultation with civilians. The laws, policies and practice should be maintained by United Nations human rights bodies.**

[57] The German Federal Constitutional Court found unconstitutional a provision in an anti-terrorism law, which empowered the Minister of Defence to order that a passenger plane be shot down if could be assumed that the aircraft would be used against the lives of others, inter alia because it would entail committing the State to using people as objects. *Bundesverfassungsgericht* (Federal Constitutional Court), *Neue Juristiche Wochenschrift*, 751 (2006), discussed in Oliver Lepsius, "Human dignity and the downing of aircraft", *German Law Journal*, vol. 7 (2006), pp. 761-762.

Domestic compliance with international standards in this regard should be monitored by United Nations human rights bodies.

93. **Laws that allow the use of lethal force in the defence of property, and those that give citizens the same powers as the police during arrest, should be revoked.**

94. **Governments should ensure that police agencies focus on developing tools and strategies for minimizing the need for lethal force to be used for arrest. These should include measures such as providing police with alternative non-lethal weaponry that can enable them to overcome suspect resistance more easily (though the use of such weaponry itself needs to be subject to strict control); emphasizing strategies of containment and de-escalation and more generally ensuring that the police make optimum use of their general superiority of numbers and technology in situations where it is anticipated that lethal force may have to be used.**

95. **Police and independent monitoring agencies should keep comprehensive data on the use of lethal force and, ideally, other dangerous forms of coercion by their members.**

96. **Training in human rights and in modern law enforcement methods, including less-than-lethal or non-lethal methods, is crucial. If it is necessary to involve the military in law enforcement, they need to undergo special training in human rights.**

97. **Modern technology (closed-circuit television cameras, cellphone recordings, etc.) should be employed to ensure accountability.**

98. **The established international standards in respect of the use of force provide the police with adequate room to deal with security concerns, also in the context of arrest, and should not be amended to achieve short-term security gains.**

99. **In addition to the role to be played by the United Nations supervisory bodies, regional human rights systems should also be encouraged to focus on the excessive use of force during arrest.**